JB KULIM DEVELOPMENT SDN BHD

v.

GREAT PURPOSE SDN BHD

HIGH COURT MALAYA, ALOR SETAR
BALIA YUSOF JC
[ORIGINATING SUMMONS NO: 24-1124-2001]
7 FEBRUARY 2002

CIVIL PROCEDURE: *Injunction - Injunction to restrain winding-up petition - Plaintiff's failure to pay monetary debt - Whether there was bona fide dispute as to debt - Whether there was sufficient ground to restrain defendant from proceeding with winding-up action - Prima facie case - Whether established against defendant*

CIVIL PROCEDURE: *Injunction - Legal right - Plaintiff's right to file injunction - Whether should wait for actual petition for winding-up to be filed and served against them - Right of defendant to commence winding-up petition the moment plaintiff deemed unable to pay debt under s. 218(2)(a) Companies Act 1965*

CIVIL PROCEDURE: *Injunction - Injunction to restrain winding-up petition - Non-disclosure of certain material facts by applicant - Effect on application seeking injunctive relief - Whether such conduct augured well for party seeking equity*

The plaintiff applied for an injunction order to restrain the defendant from filing a winding-up petition after being served with a statutory notice under s. 218 of the Companies Act 1965 ('the Act'), when the plaintiff failed to make payment of some monetary debt due and owing to the defendant.

Held:

[1] In the evaluation of the affidavit evidence, there was an admission of the debt by the plaintiff. The documents also showed that there was no *bona fide* dispute as to the debt. Even if the plaintiff disputed as to the exact amount of the debt owed to the defendant, it was not a sufficient ground to restrain the defendant from proceeding with the winding-up action as long as the debt exceeded the statutory amount of RM500. Furthermore, the issues relied on by the plaintiff in this application were not *bona fide* and thus, the plaintiff had therefore failed to establish a *prima facie* case against the defendant. (pp 351 f, 352 d, 353 a & 354 a-b & f)

[2] The plaintiff's right to file an injunction in this case was never questionable and it did not have to wait for the actual petition for winding-up to be filed and served on it. Likewise, the defendant who had duly served a s. 218 notice had every right to file a winding-up petition the moment there was failure to pay within 21 days, as by then, the plaintiff was deemed to be unable to pay its debt under s. 218(2)(a) of the Act. (p 355 e & g)

[3] Since the plaintiff's affidavit failed to make a full and frank disclosure of certain material facts of its admission of indebtedness, such conduct had adversely affected the plaintiff's application for this injunctive relief. An injunctive relief is discretionary in nature, and the court has the discretion to tilt the scale according to justice and equity of the matter. In this respect, such conduct did not augur well for the plaintiff. (pp 355 i & 356 a-c)

Per curium:

[1] It must be remembered that each application for an injunctive relief must be looked into and decided upon its own merits. An injunctive relief cannot be simply stopped by the other party filing a winding-up petition and getting it heard before the injunction application is set down for hearing. (p 357 c-d)

[Application dismissed.]

Case(s) referred to:

Anglian Sales Ltd v. South Pacific Manufacturing Co Ltd [1984] 2 NZLR 249 ***(refd)***
Bryanston Finance Ltd v. D Vries (No 2) [1976] 1 All ER 25 ***(refd)***
Chip Yew Brickworks Sdn Bhd v. Chong Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 ***(foll)***
Commonwealth Bank of Australia v. Individual Homes Pty Ltd (119 ACTR 1) ***(refd)***
Dikwa Holdings Pty Ltd v. Oakbury Pty Ltd [1992] 8 ACSR 53 ***(refd)***
Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749 ***(foll)***
Instrumech Engineering Sdn Bhd v. Sensor Link Sdn Bhd [2001] 1 CLJ 132 ***(foll)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah [1995] 1 CLJ 293 ***(not foll)***
Lim Tjoen Kong v. A-B Chew Investment Pte Ltd [1991] 3 CLJ 1945; [1991] 4 CLJ (Rep) 550 ***(foll)***
Malayan Banking Bhd v. Red Box (M) Bhd [2000] 6 CLJ 21 ***(foll)***
Natseven TV Sdn Bhd v. Television New Zealand Ltd [2001] 4 CLJ 722 ***(foll)***
Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 ***(foll)***
Perpetual Plantations of Australia Ltd v. United Tree Farmers Ltd [1992-1993] 10 ACSR 82 ***(foll)***
Re Tweeds Garages Ltd [1982] CL 406 ***(refd)***
Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd [2000] 7 CLJ 320 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218(2)(a)

Other source(s) referred to:
HAJ Ford & RP Austin, *Fords' Principles of Corporation Law,* 6th edn, p 818

For the plaintiff - Ravi Chandra; M/s A Nagarajan & Co
For the defendant - JT Chong; M/s JT Chong & Assoc

Reported by Raja Vishnu Sivarajah

JUDGMENT

Balia Yusof JC:
This is an application by the plaintiff to restrain the defendant from filing a winding-up petition after being served with a statutory notice under s. 218 of the Companies Act 1965. Alternatively the plaintiff is also seeking to restrain the defendant from serving the petition until the plaintiff's claim against the defendant in a civil suit to be filed has been determined by the court and also to restrain the defendant from advertising the said petition. Preceding this application, the defendant has through a notice dated 28 September 2001 notified the plaintiff that the sum of RM888,009.79 is due and owing to the defendant and the plaintiff was further notified that failure to make payment of the said sum within twenty one days from the date of service of the notice, the plaintiff would be deemed unable to pay its debts pursuant to s. 218(2)(a) of the Companies Act 1965 and proceedings will thereafter be commenced to wind up the plaintiff pursuant to the provisions of the said Act.

As the events unfold, it is revealed that a second notice under s. 218 of the Companies Act 1965 dated 15 November 2001 was served on the plaintiff. This second notice was necessitated by the adjustment made by the architect and thus claiming a total sum of RM853,051.79. The petition for winding-up was subsequently filed by the defendant based on this reduced figure.

The application of the plaintiff was filed on 27 October 2001 and supported by an affidavit affirmed by one Nawab Rajah K.A.M. Abdul Kader the General Manager of the plaintiff on the same date and a further affidavit was filed on 2 January 2002. Plaintiff also filed a Perakuan Segera on 30 December 2001 and the matter was fixed for hearing on 21 January 2002. The defendant, in reply, filed two affidavits affirmed by one Phoo Meng Khaw, the Managing Director of the defendant, encls. 8 and 17 filed on 20 December 2001 and 10 January 2002 respectively. The court heard the submissions of the plaintiff on 21 January 2002 and adjourned it to 23 January 2002 to hear the submissions of the defendant. Before hearing the submissions of the parties, the court had earlier ruled that despite encl. 13, the court can proceed to hear submissions of the parties on the application for the injunction. Enclosure 13 is an application by the defendant to strike out the plaintiff's application which has been fixed for hearing before the registrar on 13 March 2002.

The plaintiff submitted a written reply to the defendant's submission on 29 January 2002 and the defendant submitted its submission in reply on 4 February 2002. In the meantime the court has fixed this matter for decision on 7 February 2002.

The plaintiff is a developer of Taman Seri Marina Mukim Kuala Muda Daerah Kota Setar and the defendant was appointed as the contractor to the said project. The project consisted of two packages to build various types of houses and two separate agreements were entered into between the parties on 1 May 2000 and 14 May 2001 respectively. The value of the package one project was RM3,399,320 while the package two project was valued at RM11,098,800. The letter of award for the package one project was given on 7 August 1999 to build 168 units of low cost and low medium single storey houses while under the package two project, the letter of award of tender was issued on 30 December 1999 to build 84 units of single storey terrace houses, 37 units of double storey terrace houses, 14 units of double storey semi detached houses, 80 units of single storey semi detached houses, 6 units of double storey shop house type 'A' and 7 units of double storey shop house type 'B'. The contract period under the package one project was from 15 August 1999 to 14 August 2000 while the contract period for the package two project was from 1 January 2000 to 30 June 2001. Both projects encountered problems as the result of which the contract period for both were extended to 30 March 2001 and 30 December 2001 for package one and two respectively. As evidenced from the various affidavits filed by the parties, disputes arose between the parties as to the progress of the project itself, the quality of work as well as the problem of payments, each party putting the blame on the other. The differences between the parties came to a climax when on 21 November 2000 the plaintiff went on site and took over the project. Prior to this incident, the defendant had served a s. 218 notice *vide* notice dated 28 September 2001 on the plaintiff demanding a sum of RM888,009.79. This figure was subsequently adjusted and by a new notice dated 15 November 2001 a sum of RM853,051.79 was demanded from the plaintiff. It was based on this notice that a winding-up petition against the plaintiff was filed on 12 December 2001. As intimated earlier, the plaintiff had on 27 October 2001 filed an originating summons seeking for an order among others, to restrain the defendant from proceeding with the winding-up action.

The issue that arises for determination in this case is whether the plaintiff may obtain an injunction against the impending threat of a winding-up petition brought by the defendant based on a notice issued under s. 218 of the Companies Act 1965 and what is the standard of proof or test required of the plaintiff to succeed in such an application.

In *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722 Low Hop Bing J stated at p. 731:

> In order to succeed in an application for injunctive relief to restrain the defendant from proceeding with the winding-up petition, I am of the view that the standard of proof or test required of the plaintiff is to establish a *prima facie* case and not merely a serious question to be tried. I am fortified in this view by a number of authorities. In *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 1 All ER 25 CA, the defendant held 62 shares in a company whose issued capital was more than seven million shares.
>
> The company applied for an injunction restraining the defendant from presenting a winding-up petition. The judge of the first instance held that he should decide whether to grant the injunction on the balance of convenience, obviously relying on the test applied by the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504 and then granted the injunction. On appeal, the Court of Appeal held, *inter alia*, that the plaintiff company was only entitled to interlocutory relief to prevent anticipated litigation if on the available evidence it could be said that presentation of a petition would *prima facie* be an abuse of process. In other words, the court should not interfere with what otherwise be a legitimate petition unless there were sufficient *prima facie* evidence.

At p. 733 His Lordship held that:

> ... for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding-up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a *prima facie* case and that the principle relating to the test of "serious question to be tried" in *American Cyanamid, supra,* as applied in *Keet Gerald Francis Noel John v. Mohd. Noor bin Abdullah* [1995] CLJ 293 is not applicable as the applications there were no applications to restrain winding-up petitions or proceedings, such as in the instant case before me.

A similar view was also expressed by Abdul Malik Ishak J in the case of *Malayan Banking Bhd v. Red Box (M) Bhd* [2000] 6 CLJ 21 where His Lordship held:

> By virtue of the *Bryanston Finance Ltd (supra)* the burden was on the respondent to establish a *prima facie* case to support the notice of motion in encl. 14. The onus on the respondent was not merely to raise a serious question to be tried as envisaged by Lord Diplock in the *American Cyanamid* [1975] AC 396 but the respondent has the added responsibility by way of a higher standard of proof to convince me in regard to the notice of motion in encl. 14 (*Bryanston Finance Ltd (supra)* and *Cylian Sales Ltd (supra)*).

In the course of the plaintiff's counsel's submission, it has been urged before me that the Court of Appeal's decision in *Keet Gerald Francis Noel John v. Mohd. Noor bin Abdullah* [1995] 1 CLJ 293 must be relied upon in deciding whether or not to grant an injunction. Gopal Sri Ram JCA at p. 305 held that a judge hearing an application for a interlocutory injunction should:

> 1) ask himself whether the totality of the facts presented before him disclosed a *bona fide* serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify with precision the issue raised and decide whether they are serious enough to merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If however, he finds that there are serious questions to be tried, he should move on to the next step of his enquiry.
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> 2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant against the harm that would result from its refusal. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of injunction, he would be entitled to refuse the relief;
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> 3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the *status quo*. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

Having studied the decisions of these three cases, I am of the view that the plaintiff in this case has to prove not merely a *bona fide* serious issues to be tried but to establish a *prima facie* case. I further hold that the case of *Keet Gerald Francis Noel John v. Mohd. Noor b. Abdullah* [1995] 1 CLJ 293 is not applicable in that the injunction that was sought for in that case was for restraining the defendant from entering into a parcel of timber concession and to prevent the defendant from giving effect to any agreement relating to the timber concession. That injunction was not to restrain the exercise of any statutory rights. Speaking of statutory rights, Chin Fook Yen J in the case of *Sri Binaraya Sdn. Bhd. v. Golden Approach Sdn. Bhd.* [2000] 7 CLJ 320 also referred to *Bryanston Finance Ltd v. D Vries (No. 2)* [1976] 1 All ER 25 CA and the New Zealand Court of Appeal case of *Anglian Sales Ltd v. South Pacific Manufacturing Co Ltd* [1984] 2 NZLR 249 and stated the following:

> These are strong persuasive authorities from the commonwealth countries. With the greatest respect, I agree and accept them to apply in the instant case. Whether it is an application to prevent the presentation of a petition or to strike out a petition the basis is the same ie, an abuse of process. It will not alter the nature of the proceedings. The order at the end of the day, if allowed, is one of dismissal without hearing. In recent trend, invariably when a petition is served there will be an application by the company to strike out the same and in some instances, if not already presented, application to restrain the petitioning. My view, therefore, is that the right to present a petition to wind up a company is a statutory right and can not be taken away simply, unless the company can seriously challenge that the petition is bound to fail in its claim. A challenger may well be reminded that the task will be heavy, because "if a challenge were allowed in circumstances short of this, the Court would in effect be refusing to give effect to the very right which the statute has conferred upon a creditor to have the petition itself considered.

The above case is a winding-up petition brought by the petitioner based on the company failing to make payment of sums certified in interim certificates issued to the company and the company applied by way of motion to strike out the petition. With the greatest respect, I agree with the learned judge and hold that the task of restraining a winding-up petition is a heavy one. The defendant's action of filing a winding-up petition based on a notice under s. 218 of the Companies Act 1965 is an exercise of its statutory right and this right ought not to be taken away simply.

I next turn to the issue of whether the plaintiff has established a *prima facie* case against the defendant. A perusal of the affidavits filed by the plaintiff in support of its application clearly indicate that there is an admission of the debt by the plaintiff. It is submitted before me that exh. PMK9 is a clear admission of indebtedness by the plaintiff wherein the plaintiff undertake to use its best endeavors to secure payments to the defendant. I cannot also ignore exh. PMK25, also in the defendant's affidavit which clearly and unequivocally admits that indebtedness. Again through a letter dated 19 September 2001 addressed to the architect and copied to the plaintiff, the minutes of meeting between the parties in this case and exhibited as exh. PMK30 is a clear manifestation of the plaintiff's indebtedness to the defendant. I pause here to observe that all these documents are exhibited in the defendant's affidavit and they stand uncontroverted and unchallenged by the plaintiff. The plaintiff did in their 'affidavit balasan plaintiff' mention about exh. PMK25 but never deny its content and admitted that it is a conditional admission of debt. On exh. PMK9 the plaintiff did not even deem it fit to refer to the relevant part of that document suggesting to use its best endeavour to secure payment and no attempt whatsoever has been made by the plaintiff to controvert exh. PMK30.

It is trite law that in the evaluation of affidavit evidence, the failure of a party to contradict his opponent is usually treated as an admission by that party of the fact so asserted. The Court of Appeal in *Ng Hee Thoong v. Public Bank Bhd.* [1995] 1 CLJ 609 held:

> Now, it is well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45, Overseas *Investment Sdn. Bhd. v. Anthony William O'Brian & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82.

The plaintiff's indebtedness to the defendant is a material issue in the instant case and there is failure on the part of the plaintiff to contradict it. These documents, taken in its totality point to one fact, namely that the plaintiff is indebted to the defendant and that there is no *bona fide* dispute to such debt. There are abundant authorities to support this view. In *Chip Yew Brickworks Sdn. Bhd. v. Chong Heer Enterprise Sdn. Bhd.* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 the facts disclosed that the respondent company in its affidavit in support of its application for injunction has admitted that it owed the appellant and stated that it was ready to pay the sum. The High Court granted injunction restraining the appellants from advertising the petition. On appeal, the Supreme Court allowed the appeal and the injunction was set aside. In *Malayan Banking Bhd. v. Red Box (M) Sdn. Bhd.* [2000] 6 CLJ 21 Abdul Malik Ishak J dismissed an application by the company to restrain a winding-up petition on, among others, the ground that there had been an admission of the debt. At p. 41, His Lordship went on further to state that:

> An admission of a particular fact my either be express or implied. In whatever form it takes, the admission must be clear and unequivocal (*Ellis v. Allen* [1914] 1 Ch 904, 909; *Ash v. Hutchinson & Co. (Publishers)* [1936] Ch. 489, 503; and *Technistudy v. Kelland* [1976] 1 WLR 1042; [1976] 2 All ER 632 CA). Thus, if a defendant admits a document but does not admit its full contents, the plaintiff may still succeed by obtaining judgment if the document, on production, clearly establishes and supports the plaintiff's claim (*Barnard v. Wieland* [1882] 30 WR 947; *Rutter v. Tregent* [1879] 12 Ch. D 758; and *Smith v. Davies* [1884] 22 Ch. D 650).

As stated earlier in my finding as to exhs. PMK9, PMK25 and PMK30, these documents clearly support and establish the plaintiff's indebtedness to the defendant and even if the plaintiff does not admit its full content, they are sufficient to prove its debt.

What seems to be clear in this case is that the plaintiff merely disputes the amount of the debt owed to the defendant and that is not a sufficient ground to restrain the defendant from proceeding with the winding-up action. An authority to support this view is readily available from the decision of the Supreme Court in *Chip Yew Brickworks Sdn. Bhd. v. Chong Heer Enterprise Sdn. Bhd.* [1988] 2 CLJ 424 which had this to say:

> Although in the letter "J" referred to by the learned Judge the respondent company disputed the appellant's claim for RM127,159, in its affidavits in support of its application for injunction the respondent company admitted that it owed the appellant a sum of RM60,580 and stated that it was at all times ready and willing to pay this sum. In our judgment, as the debt of RM60,580 is not disputed the respondent company is caught under s. 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding-up or not to order it. If an order to winding-up is made the respondent company can still defend on the balance amount in dispute. Under the Act the liquidator may defend any action or other legal proceedings in the name and on behalf of the company which has been ordered to be wound up. The Act also provides for the fixing of dates on which creditors are to prove their debts or claims against the company. Even where the whole amount of debt claimed is disputed the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd.* [1946] 2 All ER 197.

Again in *Sri Binaraya Sdn. Bhd. v. Golden Approach Sdn. Bhd* [2000] 7 CLJ 320 at p. 333-334 Chin Fook Yen J stated:

> I do not think the company's dispute herein is *bona fide* and on substantial ground. In the Court of Appeal case of *YPJE Consultancy Services Sdn. Bhd. v. Heller Factoring (M) Sdn. Bhd.* [1996] 3 CLJ 51, the question that arose for consideration was whether the court should dismiss the application for winding-up because the amount which was demanded in the statutory notice was 'incorrect or unclear'. His Lordship Ahmad Fairuz JCA, upon reviewing cases from overseas, held that so long as the amount exceeded the quantum of RM500 it was legitimate to look at the circumstances in order to determine whether the company was unable to pay its debt.

The cases referred to by his Lordship Ahmad Fairuz JCA were *Re Tweeds Garages Ltd.* [1982] CL 406, *Commonwealth Bank of Australia v. Individual Homes Pty. Ltd.* (119 ACTR, 1) and *Dikwa Holdings Pty. Ltd. v. Oakbury Pty. Ltd.* [1992] 8 ACSR 53.

All these cases are company winding-up cases and the rationale that has been expounded in these cases illustrate the view, which I am in concurrence with, that a dispute as to the amount of the debt is insufficient ground to dismiss a winding-up petition so long it exceeds the statutory amount of RM500. Applying this principle to the plaintiff in our present case, I am of the considered view that a dispute as to the exact amount of the debt owed to the defendant is not a sufficient ground to restrain the defendant from proceeding with the winding-up action. The amount of debt admitted by the plaintiff for exceeds the statutory amount of RM500.

The grounds relied upon by the plaintiff in its argument to obtain injunction against the defendant's winding-up action is based mainly on the complaint against the defendant's defective work, the delay, and failure to comply with the plaintiff's instruction. The plaintiff also argued that the claim being based on interim certificates is not a final claim and that the plaintiff has a right to set off against the defendant. From the evidence adduced, the contract in the instant case was extended not once but twice and both parties agreed to it. All along in the course of the dealing between the two parties and with the extension of the contract, these issues took a centre stage. This led the parties to blame each other culminating in the plaintiff taking over the worksite and the defendant serving a notice under s. 218 of the Companies Act 1965. From the facts disclosed it is evident that the real complaint of the plaintiff is one relating to the quality of work and the plaintiff having problem with cash flow resulting in either slow or non payment for the work done by the defendant.

In its totality, I find that the attempt by the plaintiff to bring up these issues to restrain the defendant from pursuing its winding-up action is not *bona fide* and there is further no *bona fide* dispute on the debt. The plaintiff therefore has failed to establish a *prima facie* case against the defendant.

On interim certificates which form the basis of the defendant's claim against the plaintiff, it was strenuously argued before me that by its nature which is not conclusive it could not be used as evidence to wind up a company. In dealing with this issue I need not go further than just by referring to a passage from the judgment of Chin Fook Yen J in the case of *Sri Binaraya Sdn. Bhd. v. Golden Approach Sdn. Bhd.* [2000] 7 CLJ 320 at p. 335-336:

> In the case of *Pembenaan Leow Tuck Chui & Sons Sdn. Bhd. v. Dr. Leela's Medical Centre Sdn. Bhd.* [1995] 2 CLJ 345 the Supreme Court there was called upon to determine the question under cl. 30(1) as to when the amount certified in an interim certificate became due and payable. In the case, the period for the honouring of interim certificates issued under cl. 30(1) was 21 days from date or presentation thereof to the employer. "In other words, although the right to payment of the sum so certified will have accrued upon

> presentation of an interim certificate to the employer, payment thereof may not be enforced until expiry of the period of 21 days" (see p. 64H). His Lordship emphasised the seriousness for the honouring of the interim certificate under cl. 26(1)(a) which allowed the builder to determine the contract or to suspend works if the employer did not pay the certified sum. Similarly, in our case, the right will have accrued immediately upon issuance of the certificates concerned, however, payment thereof may only be enforced until expiry of the period of 30 days. The question called for determination in *Dr. Leela*'s case was, similar to our case, the construction to be given to an interim certificate issued in connection with the construction industry as to when the amount certified therein became due and payable. Although *Dr. Leela*'s case *(supra)* was an O. 14 application, I will adopt the *ratio decidendi* there to our case here, as the issue involved is the construction of similar works used in the same construction industry.

As I have indicated earlier, the plaintiff is also seeking to set off against its debt which is founded on the interim certificates issued by the architect. My perusal of cl. 30 of exh. PMK2, the Building Contract in particular cl. 30.3 gives no such right to set off and since the interim certificate is enforceable upon the expiry of the time stated in the appendix, the defendant has every right to enforce it. In my view, this clearly indicate the lack of *bona fide* dispute on the indebtedness of the plaintiff.

The plaintiff's right to file an injunction in this case is never questionable and it does not have to wait for the actual petition for winding-up to be filed and served on them (*Instrumech Engineering Sdn. Bhd. v. Sensor Link Sdn. Bhd*. [2001] 1 CLJ 132). In *Fords' Principles of Corporation Law* (6th edn) by HAJ Ford and RP Austin (at p. 818) it was stated:

> An application for winding-up even if subsequently dismissed as being ill founded, can damage a solvent company's reputation. For that reason a company may be able to persuade the Court at an early stage, before the filing of an application, to issue, in exercise of its inherent jurisdiction to restrain filing or advertisement or both as an abuse of the Court's process.

Likewise, the defendant who has duly served a s. 218 notice has every right to file a winding-up petition the moment there is failure to pay within 21 days, as by then, the plaintiff is deemed to be unable to pay its debt under s. 218(2)(a) of the Companies Act 1965.

Be that as it may, it is contended by the defendant that to grant an injunction under the circumstance of this case would be oppressive to the defendant as the injunction will be perpetual in its effect. The plaintiff has not given any undertaking of any sort that it will ever file any action against the defendant and has not even deem it fit to suggest so in its affidavit. I am in concurrence with the defendant and since an injunctive relief is discretionary in nature,

the court has the discretion to tilt the scale according to the justice and equity of the matter. In this respect, the popular maxim of those seeking equity must come with clean hands is aptly applicable in considering the conduct of the plaintiff in bringing this action. The plaintiff's affidavit has failed to disclose certain material facts which in the opinion of this court ought to be disclosed by the plaintiff. In my view the failure of the plaintiff to disclose its admission of indebtedness calls for some consideration and in that respect this court is of the view that such conduct on the part of the plaintiff has certainly adversely affected the plaintiff's application for this injunctive relief. The plaintiff in my view has not been forthright in failing to mention anything about its admission of the indebtedness and has failed to make a full and frank disclosure about that material fact. Such a conduct certainly does not augur well for a person who is seeking equity.

I shall now turn to one other issue which is of no less importance which involves the consideration of exhs. PMK46 and PMK47 exhibited in the defendant's second affidavit in reply affirmed by one Phoo Meng Khaw on 10 January 2002 (encl. 17). PMK46 is a letter dated 20 October 2001 from the plaintiff addressed to the defendant made on a 'without prejudice' basis suggesting some form of settlement pertaining to the debt owed to the defendant.

The other exh. PMK47 is a letter dated 24 October 2001 from the defendant to the plaintiff also indicating some form of settlement proposal which was purportedly discussed and agreed between the parties. The said letter was also made on a 'without prejudice' basis. It was submitted by the counsel for the defendant that these exhibits are clear admissions of debt by the plaintiff. Counsel for the plaintiff objects to the admissibility of these two documents on the ground that they are made on a 'without prejudice' basis and ought not to be relied upon. Counsel for the defendant argues that by introducing exh. NR2 in the plaintiff's 'affidavit balasan plaintif' affirmed by the one Nawab Rajah b. K.A.M Abdul Kader on 1 January 2001 (encl. 10) the plaintiff has waived the privilege attached to the documents. The draft Deed of Settlement and the Guarantee cum Indemnity Agreement exhibited as exh. NR2 in the said enclosure were also made on a 'without prejudice' basis and it was the plaintiff who first introduced those documents. Having heard the submission of both counsels over the issue and on the authority of *Dusun Desaru Sdn. Bhd. & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749 and *Lim Tjoen Kong v. A-B Chew Investment Pte. Ltd* [1991] 3 CLJ 1945; [1991] 4 CLJ (Rep) 550, I hold that there was a waiver on the part of the plaintiff when it first introduced the 'without prejudice' document in encl. 10 and accordingly these 'without prejudice' documents in both encls. 10 and 17 are admissible. In my view the exhibits marked PMK46 and PMK47 speak volumes of the plaintiff's debt.

Counsel for the plaintiff also seeks to draw a distinction on the basis that at the time the injunction was filed there was no suit pending (in this case the winding-up petition) as opposed to what happen in *Natseven TV Sdn. Bhd. v. Television New Zealand Ltd (supra)* and *Perpetual Plantations of Australia Ltd v. United Tree Farmers Ltd* [1992-1993] 1 10 ACSR 82. In my view that is not a good ground to distinguish those cases. The principle established in those cases must be followed. It is certainly not true to say as the plaintiff had contended, that this court will be setting a bad precedent for future litigants and will open the floodgates for future litigants to abuse the process of court whereby if one party files an injunction application after receiving a s. 218 notice to stop a wind up petition from being presented, all the other party has to do is simply file a winding-up petition before the hearing date of the injunction. It must be remembered that each application for an injunctive relief must be looked into and decided upon its own merits and I would not go so far as to suggest that an injunctive relief can be simply stopped by filing a winding-up petition and get it heard before the injunction application is set down for hearing. I am constrained to hold such an argument as being preposterous.

Having considered all the evidence before me and after perusing the submissions made by both counsels, I find comfort in citing a passage from the judgment of His Lordship Low Hop Bing J in *Natseven TV Sdn. Bhd. v. Television New Zealand Ltd* [2001] 4 CLJ 722 at p. 729:

> In *Perpetual Plantations of Australia Ltd v. United Tree Farmers Ltd* [1992-1993] 10 ACSR 82, the defendant (United) presented proceedings to wind-up the plaintiff (Perpetual). Perpetual applied for an injunction restraining United from, *inter alia*, continuing with the winding-up petition. One of the central issues there was whether the balance of a particular debt was presently due and payable. The grounds proffered by Burley, J in refusing the application for injunctive relief may be summarised as follows:
>
> 1. the dispute as to whether the sum was due and payable should be best resolved in the winding-up Court;
>
> 2. The company may seek an injunction in the winding-up Court instead of commencing separate proceedings to restrain winding-up proceedings.
>
> 3. to allow an interim injunction in a Court, other than the winding-up Court, to restrain winding-up proceedings, would be "to encourage litigants to commence a multiplicity of proceedings where the same were not necessary".

> Having had the opportunity to perusing the well-considered judgment of Burley, J, I am in entire agreement with the reasoning expounded therein. In addition, I would observe that *Perpetual Plantation of Australia Ltd v. United Tree Farmer Ltd, supra,* is in consonance with our s. 221(1), *supra,* which confers jurisdiction on the winding-up court to stay winding-up proceedings and so the most appropriate forum to decide whether or not winding-up proceedings should continue should be the winding-up court.

I am of a similar view. Accordingly on the reasons given above, I hold that the plaintiff's application for injunction must fail and I therefore dismiss it with costs.